Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 9, 1997

Mr. James Eidson
Criminal District Attorney
Taylor County Courthouse
300 Oak
Abilene, Texas 79602-1577

OR97-2710

Dear Mr. Eidson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110838.

The Taylor County Criminal District Attorney's Office (the "district attorney") received a request to view and copy certain case files maintained by the district attorney. You explain that some of the requested information does not exist and some will be released to the requestor. You claim, however, that the remaining information is excepted from disclosure under sections 552.027, 552.101, 552.103, and 552.108 of the Government Code.[1] We have considered your arguments and reviewed the representative sample of documents.[2]

Section 552.103(a) of the Government Code reads as follows:

> (A) Information is excepted from [required public disclosure] if it is information:

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[1]Section 552.028 does not relieve a governmental body of its obligation to accept and comply with an open records request from an attorney who is making such a request on behalf of an inmate whom he is representing. *See* Act of June 1, 1997, H.B. 951, § 6, 75th Leg., R.S. (renumbering former section 552.027 as section 552.028 of the Government Code).

[2]In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
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> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[3] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you state that the requestor is currently representing her client in his Application for Post Conviction Writ of Habeas Corpus. Additionally, you explain that all of the requested information pertains to the same criminal episode and, therefore, relates to

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[3]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

the pending litigation. We conclude that you have shown that litigation is reasonably anticipated and that the requested information relates to the anticipated litigation. Therefore, the district attorney may withhold the requested information from required public disclosure.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a).[4] We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).[5]

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

June B. Harden
Assistant Attorney General
Open Records Division

JBH/glg

Ref.: ID# 110838

Enclosures: Submitted documents

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[4]We note that section 552.103(a) cannot be invoked to withhold from disclosure front page type information, as this information should have already been provided to a defendant by a magistrate or in an indictment. Open Records Decision No. 597 (1991).

[5]Because we make a determination under section 552.103, we need not consider your additional arguments against disclosure. We note, however, that some of the requested information may be confidential by law and must not be released even after litigation has concluded. See Gov't Code § 552.101. If you receive a subsequent request for the information, you should re-assert your arguments against disclosure at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense).

cc: Ms. Rita J. Radostitz
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(w/o enclosures)